85-2072

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID S. SANDS,
PETITIONER,

v.

MICHAEL J. CUNNINGHAM, WARDEN,
NEW HAMPSHIRE STATE PRISON,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED FOR REVIEW

Does an extraordinary twenty-nine month delay by a state appellate court in rendering a decision on appeal, caused by purely administrative reasons and by no act of the defendant, violate petitioner's right to a speedy trial under the Sixth Amendment and right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. David S. Sands
2. Michael J. Cunningham,
   Warden
   New Hampshire State Prison

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, David S. Sands, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit, entered in the case on March 20, 1986. As part of the relief requested, the Petitioner prays that this Court issue a Certificate of Probable Cause and reinstate the appeal.

Opinions Below

The decision of the United States Court of Appeals for the First Circuit, not officially reported, appears in Appendix A. The opinion of the United States District Court for the District of New Hampshire, not officially reported, appears in Appendix B.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit from which review is sought was entered on March 20, 1986. The New Hampshire Supreme Court affirmed the petitioner's convictions by decision entered on August 29, 1983. The petitioner then timely filed a petition for habeas corpus in the United States District Court for the District of New Hampshire. The United States District Court denied that petition by decision and judgment entered on October 1, 1985. The District Court thereafter denied the petitioner's request for a certificate of probable cause. A notice of appeal was filed with the Court of Appeals which resulted in the decision of March 20, 1986, denying a petition for issuance of a certificate of probable cause in that court. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth in Appendix C: the Fifth, the Sixth, and the Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

At issue in this case is the validity and force of an individual's Sixth Amendment right to speedy trial and concomitant Fifth and Fourteenth Amendment guarantees of due process when confronted with a twenty-nine month bureaucratic delay between oral argument and rendering of judgment by the New Hampshire Supreme Court. This proceeding arises out of a state court prosecution and conviction of the petitioner on two counts of perjury. (A complete factual listing of the circumstances surrounding the allegedly perjurious statements is reported in *State* v. *Sands*, 123 N.H. 570, 582-88, 467 A.2d 202 (1983).)

Procedural Background

The petitioner was first charged in this matter by indictments returned in September, 1977, charging him with two instances of perjury. The perjuries were alleged to have occurred in a civil proceeding pending in the Carroll County Superior Court earlier that year. The subject matter of the perjury was the identity of the individual who had signed a certain petition for ex parte attachment in 1974. The civil suit was ultimately settled without injury to any third persons and to the satisfaction of all parties concerned.

The case was tried in November and December, 1978, resulting in convictions by jury verdicts rendered on December 13, 1978. Thereafter, the petitioner timely appealed to the New Hampshire Supreme Court. Subsequent to the convictions but prior to briefing in the Supreme Court, the petitioner moved and was granted the opportunity to reopen the record and conduct an evidentiary hearing, at which the trial court permitted additional evidence to be received in support of the petitioner's motion for a new trial or acquittal on grounds of prosecutorial misconduct. This motion was denied. The petitioner also instituted two federal court actions during the period before argument in the Supreme Court. In the first, he sought review of the trial court's "reasonable doubt" instruction to the jury, which instruction was upheld in the First Circuit Court of Appeals. *Tsoumas* v. *State of New Hampshire*, 611 F.2d 412 (1st Cir. 1980). In the second, the petitioner sought information under the Freedom of Information Act relating to prosecutorial team contacts with the I.R.S. urging the I.R.S. to investigate the petitioner for tax fraud. *Sands* v. *Murphy*, 633 F.2d 968 (1st Cir. 1980).

The appeal was briefed by all parties during January and February, 1981, and orally argued on March 6, 1981. Prior to oral argument, four of the active members of the New Hampshire Supreme Court recused themselves or were otherwise unable to sit. Upon motion of the defendant, the New Hamp-

shire Supreme Court specially designated four justices (three from the superior court and one from retirement) to fill the panel. On April 22, 1981, one of the specially designated justices, Mullavey, J., died. On January 24, 1983, a second justice, Lampron, J., died.

Finally, on August 29, 1983, twenty-nine months (nearly two and one-half years) after oral argument, the New Hampshire Supreme Court rendered its decision affirming the convictions by a split two to one decision. *State* v. *Sands*, 123 N.H. 570, 467 A.2d 202 (1983). This twenty-nine month delay was not caused by any fault or action of the defendant.

Following the decision, the petitioner filed a motion to reduce his 1978 sentence which had been stayed pending the appeal. This motion was argued in November, 1983, resulting in a resentencing order on December 29, 1983. In the interim, the petitioner also filed motions to dismiss and to set aside the verdicts on grounds, among others, that the extraordinary twenty-nine month delay between oral argument and rendering of decision on appeal denied the defendant his rights to due process of law and a prompt and speedy remedy. The trial court, after evidentiary hearing, denied this motion and a second appeal was taken to New Hampshire Supreme Court. The New Hampshire Supreme Court summarily affirmed these denials by order, without opinion, dated January 4, 1985.

The defendant commenced serving the incarceration portion of his sentence on December 10, 1984 and was paroled on May 17, 1985. On June 19, 1985, the Petitioner sought a writ of habeas corpus from the United States District Court for the District of New Hampshire, citing a number of federal constitutional grounds for issuance of the writ, including the constitutional violations resulting from the appellate delay occurring in the New Hampshire Supreme Court. This petition was denied by opinion entered October 1, 1985, finding on that issue, "the Sixth Amendment right to speedy trial is inappli-

cable to (petitioner's) state appellate proceeding." Appendix B, p. 26. The petitioner's request for the issuance of a certificate of probable cause was similarly denied by the District Court. The petitioner thereafter entered his notice of appeal in the United States Court of Appeals for the First Circuit, together with a request for issuance of a certificate of probable cause by that court. On March 20, 1986, the Court of Appeals denied that request, resulting in this action.

Reasons for Granting the Writ of Certiorari

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS, IN REFUSING TO ISSUE A CERTIFICATE OF PROBABLE CAUSE, HAS SANCTIONED AN OPINION OF THE DISTRICT COURT WHICH IMPROPERLY NARROWLY DEFINES THE SCOPE OF A DEFENDANT'S RIGHTS TO DUE PROCESS AND SPEEDY RESOLUTION DURING THE APPELLATE STAGES OF A CRIMINAL PROSECUTION. THE ERROR RAISES IMPORTANT QUESTIONS OF FEDERAL LAW.

The District Court below found that petitioner's Sixth Amendment rights "do not apply in the context of an appellate proceeding when the accused has already been convicted of an offense," Appendix B, p. 26, citing as authority a District of Columbia case and several Ohio lower court decisions. This contention conflicts with this Court's recent opinion in *United States* v. *Loud Hawk*, 106 S.Ct. 648, *pet. for rehearing denied* 106 S.Ct. 1289 (1986). The safeguards provided by the Sixth Amendment's guarantee of a speedy trial, Justice Powell wrote, "may be as important to the accused when the delay is occasioned by an unduly long appellate process as when the delay is caused by a lapse between the initial arrest and the drawing of a proper indictment." *Id.* at 655. Justice Powell's

statement is in line with Justice Brennan's note in *Dickey* v. *Florida*, 398 U.S. 30, 43, n.7 (1970), that "(D)elay may also occur during the appellate process. . . ."

The delay in the present case unreasonably and unnecessarily punished the petitioner: he lived with the daily mental anguish occasioned by the disruption of his life caused by the presence of unresolved criminal charges. This greatly hurt his business, affected his financial resources, curtailed his associations, created anxiety in him and his family, and held him up to continuing public scorn. The inordinate delay created a restraint on petitioner's liberty and caused him to be unable to make long-term plans. It also substantially impaired his personal and professional life and resulted in a prolonged period of adversity and embarrassment as well as ongoing public accusation.

This Court has stated clearly that the moment at which the protection of the Speedy Trial Clause engages is upon the imposition of the actual restraint of arrest and holding to answer to a criminal charge. *Loud* v. *Hawk*, at 654, citing *United States* v. *Marion*, 404 U.S. 307, 320 (1971). What remains to be clarified is the point at which the protections of the Speedy Trial Clause cease to apply.

It is axiomatic that any case before an appellate court should be disposed of without delay. *Deaton* v. *Deaton Truck Lines*, 242 Ala. 91, 4 So.2d 895 (1941); *Freed Realty Co.* v. *Singer*, 126 So. 74 (La. Ct. Ap. 1930); *Manges* v. *Mustang Oil Tool Co.*, 658 S.W.2d 725 (Tex. Civ. App. 1983). *See generally* 5B C.J.S. "Appeal & Error" § 1843 (1958). Indeed, some jurisdictions have specifically codified the right to a reasonably prompt resolution of litigation on appeal. *See, e.g., Temple Baptist Church* v. *Georgia Terminal Co.*, 128 Ga. 699, 58 S.E. 157 (1907). The concern for prompt resolution of appeals is even more apparent in criminal cases. Additionally, it is beyond question that the defendant's rights to fundamental fairness and due process of law do not cease upon conviction.

U.S. Const. Amend. XIV. The instant delay of twenty-nine months violated all notions of fairness and due process.

While the application of these rights has not occurred in the context of a case involving an appellate delay similar to this action, there is abundant case law indicating that the right to a prompt resolution of criminal cases applies to all stages of the criminal process, including post-conviction ones. For instance, in *Carter* v. *State,* 339 So.2d 594 (Ala. Crim. App. 1976), the defendant had been convicted of assaulting a federal officer. When he reported to the sheriff's office to begin serving his sentence, he was instructed to return to his home. Eleven months later, he was arrested to begin serving his sentence. The Court of Criminal Appeals discharged the defendant, holding that the eleven month delay was an "unreasonable period of time" for execution of sentence and that, therefore, the trial court was estopped from ordering the defendant to begin his sentence. *Id.* at 396.

Similarly, in *Yates* v. *Buchanan,* 170 So.2d 72 (Fla. 3d DCA 1964), the court discharged a defendant convicted of receiving stolen property. The defendant appealed his conviction, withdrew the appeal and filed a motion for mitigation due to health. The trial court suspended the execution of sentence for four years at which time it sought to enforce the sentence. The District Court of Appeal held that due to the delay the order was void and unenforceable.

The significance of the role of due process in these delay cases was articulated by the court in *State* v. *Buchanan,* 149 So.2d 574 (Fla. 3d DCA 1963). In *Buchanan,* the court granted the writ of habeas corpus and held:

> [W]e cannot conceive how society at this late date after the lapse of more than five years, would have a bona fide interest in the enforcement of this judgment against the petitioner, a 71-year-old man. Certainly it could not be upon the basis of retaliation for punishment is not inflicted for the purpose of retaliation, but solely for the

> protection of the public. It would be manifestly unjust, *if not a denial of due process*, to permit the incarceration of this petitioner after so long a time.

Id. at 576. [emphasis added].

In *People* v. *Ripa*, 449 N.E.2d 977 (Ill. App. 2d Dist. 1983), the defendant was convicted and sentenced under the State's Cannabis Control Act and released on an appeal bond. On the advice of his attorney, in conformance with local practice, defendant awaited notification of the time to begin serving his sentence after his conviction was affirmed. Notification was made after an eighteen and one-half month delay. The court held that habeas corpus relief would lie where the state offered no reasonable explanation for the delay and did not rebut evidence that defendant had lived as a responsible, law abiding citizen during the interim. *Ripa* followed the reasoning in *People ex rel. Millet* v. *Woods*, 303 N.E.2d 32 (1973), the only difference in the two cases being the length of the delay: in *Millet* almost five years elapsed before the appellate mandate was carried out. The court found that "incarceration at that late date would serve neither the principles of justice nor rehabilitation." *Id.* at 979.

Likewise, in *Ex parte Tucker*, 73 Okla. Crim. 424, 122 P.2d 174 (1942), the court held that sound public policy precluded commitment of a defendant where there had been a delay of eleven years between sentence and execution. Indeed, the court indicated that notions of speedy trial are infringed by such a delay.

> "Long and unreasonable delays in passing upon motions for new trials or in arrest of judgment are calculated to obstruct the administration of public justice, *and to operate as a denial of the right of the citizen to a speedy trial.*"

122 P.2d at 178 [emphasis added].

The relationship between speedy trial and speedy resolution of the case was also recognized in *Ex parte Bugg*, 163 Mo. App. 44, 145 S.W. 831 (1912). In *Bugg*, the defendant was permitted to leave the state due to health considerations *after* he had been convicted and sentenced for illegally selling liquor. Three years later, he returned to the state and was imprisoned pursuant to a capias execution for the original sentence. In granting the defendant's writ for habeas corpus the court observed:

> The interests of both the defendant and society must be protected, and while the defendant has guaranteed to him a speedy and fair trial, yet when he has been legally convicted and his punishment assessed, society cannot be deprived of the protection guaranteed to it by the speedy and certain punishment of offenders against its laws except for some valid reason. We do not think that mere delay in the infliction of punishment assessed is a sufficient reason for relieving the convicted party from the consequences of a judgment against him, unless the delay has been so great that society could derive no good from its enforcement; but when such delay has occurred without the fault of defendant, although with his consent, we should have no hesitancy in refusing to enforce the judgment. The criminal laws of the state are not based upon any idea of retaliation against the offender for the wrong he has done, but punishments are inflicted solely for the protection of society, and when the execution has, without the fault of defendant, been so long delayed that society can no longer have any interest in its enforcement, there would seem to be no good reason why its enforcement should be insisted upon.

145 S.W. at 832-833. The United States Fifth Circuit Court of Appeals in *Shields* v. *Beto*, 370 F.2d 1003, 1004 (1967), stressing the due process aspect of timely action by the state through its agencies, explained the *Bugg* case to mean that "each case

should rest on its own facts and such course followed as best will promote the ends of justice." *Id.* at 1005 (citation omitted).

The common thread running through the foregoing authority is that a protracted delay in the final resolution of a criminal defendant's case violates principles of public policy, due process, the proper administration of justice and speedy trial. Although these decisions are largely the product of state appellate courts, the principles underlying them have also been recognized by this court. Exemplifying this theme is the United States Supreme Court's recent statement that the purpose of a defendant's right to a speedy trial is to reduce the substantial "impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States* v. *MacDonald,* 456 U.S. 1, 8 (1982).

Similarly, unreasonable delay has been held to be violative of an accused's rights in certain situations after trial has been applied. *See Alexander* v. *Posey,* 32 Ala. App. 494, 27 So.2d 237 (1946) (After expiration of reasonable time for execution of sentence to hard labor, further detention is illegal); *Sinclair* v. *State,* 99 So.2d 238 (Fla. 1st CDA 1957) (sentence must be executed within a reasonable time); *State* v. *Piper,* 103 Kan. 794, 176 P. 626 (1918) (recognizing, but not applying, rule that state could be estopped from carrying out sentence for unconscionable delay).

The importance of due process in a criminal context is paramount. The District Court below improperly refused to recognize the due process implications, either separately or in conjunction with the requirements of the Speedy Trial Clause of the Sixth Amendment, occurring in appellate delays in criminal cases, thus too narrowly defining the scope of these important safeguards. Certiorari is warranted because of the importance of the federal question raised and because this

court will be afforded the opportunity to extend and clarify its recent Sixth Amendment analysis in *United States* v. *Loud Hawk*.

The purpose of the Sixth Amendment Speedy Trial Clause has been stated as three-fold: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3) to limit the possibility that long delay will impair the accused's ability to defend himself. *Loud Hawk* at 4086, citing *United States* v. *Ewell*, 383 U.S. 116, 120 (1966), District Court Opinion A-36. In *Loud Hawk*, this Court focussed on the second purpose, defining and limiting "public accusation" to instances where defendants are incarcerated or subjected to other substantial restrictions on liberty, *Id.*, that is, actual restraints and not merely public suspicion. Post-conviction appeals, such as that presented by petitioner's case, obviously rise to the level of public accusation. The twenty-nine months during which the New Hampshire Supreme Court deliberated must therefore weigh toward petitioner's Sixth Amendment Speedy Trial Claim. Unnecessary delays in post-conviction appeals should weigh toward a defendant's Sixth Amendment speedy trial claim, triggering as it does the concomitant interests of due process and fundamental fairness. *United States* v. *Marion*, 404 U.S. 307 (1971).

In dealing with the due process and fundamental fairness issues of the Sixth Amendment Speedy Trial Claim, this Court propounded a four-part test in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). In *Loud Hawk*, this Court adopted the four-part *Barker* test to accommodate the competing concerns of the Speedy Trial Clause and the public and individual interest in orderly appellate review. The *Barker* factors are: (1) length of delay, (2) reason for delay, (3) defendant's assertion of his rights, and (4) prejudice to the defendant. Applying the four factors in the order chosen in *Loud Hawk*, the first factor and threshold inquiry is whether the delay was long enough to be

presumptively prejudicial. *Barker* at 530. The extraordinary two and one-half year delay in the resolution of perjury charges is clearly excessive and presumptively prejudicial, if not *prima facie* unconstitutional.

The next factor to be applied is the extent to which the petitioner has asserted his speedy trial rights. Immediately upon entry of the New Hampshire Supreme Court opinion, the petitioner moved for dismissal on grounds of delay. Unlike the respondents in *Loud Hawk*, the petitioner filed no frivolous motions or appeals for which time he now seeks Sixth Amendment redress. None of the delay was of his making or control.

In assessing the responsibility of the defendant to assert his right, it should be noted that there is no procedural mechanism for making such an assertion to an appellate court, and in particular the New Hampshire Supreme Court. Secondly, unlike a pretrial proceeding, any assertion for a speedy decision on appeal may cause a conflict with other rights of the defendant. In a pretrial proceeding, a defendant naturally asserts his right to a prompt trial in order to ensure that he is able to confront the state's witnesses and evidence and present that of his own in defense before memories fade and evidence is lost. It is the *opportunity* to have the case heard which is the essence of the right. Once the opportunity to be heard has been afforded, however, as here where the case was briefed and argued, a defendant's primary concern is that the issues that he raised be properly decided with due deliberation. Given that the defendant normally has no further avenue of appeal, aggressive assertions for a speedy decision could result in a decision without due deliberation. Lastly, regular assertion of his right to speedy trial is not a prerequisite to a finding of a denial of those rights. A defendant does not waive his constitutional rights by silence. It is the government's burden to ensure a speedy resolution not the defendant's. *See* discussion in *Dickey* v. *Florida*, 398 U.S. 30, 48-50 (1970) (Brennan, J. concurring). Those cases earlier cited involving excessive

delays between conviction and execution of sentence, demonstrate that regular assertion of his rights is not a prerequisite to a finding of a denial of those rights. *Carter* v. *State, supra*; *Yates* v. *Buchanan, supra*; *People* v. *Ripa, supra.*

The fourth *Barker* factor, prejudice to the petitioner, is clearly present. Harm to the interest protected by the Speedy Trial Clause includes the loss of witnesses and the deteriorating value of their testimony, as well as the undermining of the governmental interest in deterrence caused by the distance created between punishment and offense. These are the interests identified in *Dickey* v. *Florida*, 398 U.S. at 45, n.7, as the fundamental rationale behind the Speedy Trial Clause.

The majority in *Loud Hawk* identified the second *Barker* factor, the reasons for the delay, as critical and analyzed that factor last. The delay in *Loud Hawk* was fashioned by the government's interlocutory appeals. The Court found that non-frivolous interlocutory appeals on issues of importance to the case, made without bad faith or dilatory purpose, will not be accorded any effective weight toward determining whether a defendant has suffered a violation of his right to a speedy trial. 106 S.Ct. 656-657. No such good faith appellate process necessary to the resolution of the case was here made. The reasons for the delay are purely administrative and bureaucratic. No prosecutorial purpose was served and no factors can be identified here as qualifying the delay for exemption from Sixth Amendment measurement. In this case, there is no governmental purpose which justifies the extraordinary delay; there is only an overcrowded court docket, at best.

Further reference should also be made to *Dickey* v. *Florida* as it relates to the question of the reasons for delay. In Justice Brennan's concurring opinion, he states:

> "... the critical question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided — whether it was unnecessary. To

> determine the necessity for a governmental delay, it would seem important to consider, on the one hand, the intrinsic importance for the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interests of realizing an important objective, could be suspect.

398 U.S. at 51-52; 90 S.Ct. at 575. He took the analysis one step further, stating:

> If the defendant does not cause the delay. . . , the responsibility for it will almost always rest with one or another governmental authority. *The police and prosecutors are not the only governmental officials whose conduct is governed by the speedy trial clause, it governs that of court personnel as well.* [emphasis added] [citations omitted]

Certainly a defendant will not be allowed to profit from an unreasonable delay where the delay is caused by his own actions such as when he asks for a continuance of the proceedings. The petitioner's case involved no such action by the petitioner. Having fully briefed and argued his case, the petitioner was simply awaiting a decision. There does not appear on the record of the New Hampshire Supreme Court any reason for this lengthy delay. One can only speculate that the delay was due to reasons internal to that court. Unexplained are the innumerable cases, briefed and argued after this one, which reached final decision prior to the rendering of the decision in this case. Indeed, it is observed that the New Hampshire Supreme Court normally renders its decisions in a relatively short period of time after oral argument. Further, while the defendant's appeals raised issues of constitutional

significance, the resolution of those issues did not require an extraordinary procedure differing from that employed in any criminal or civil case raising such issues.

The only other reason for the delay which could be identified from a review of the record would be that it resulted from the deaths of two of the sitting judges following oral argument. The death or disability of a judge, however, is not sufficient excuse for a denial of a defendant's rights to a prompt remedy. *Hadley* v. *State*, 66 Wis.2d 350, 225 N.W.2d 461 (1975). *See also Newlin* v. *People*, 221 Ill. 166, 77 N.E. 529 (1906), "[T]he death or incapacity of a judge of a court which prevents the court being held...require[s] that the defendant be set at liberty unless tried in accordance with [the statutory provisions for a speedy trial]."; *People* v. *Broyer*, 394 Mich. 107, 228 N.W.2d 780, 781 (1975). (An eighteen-month delay between arrest and trial due to illness and eventual death of trial judge assigned to the case denied the defendant a speedy trial.) This is particularly true where the loss of one or more judges does not prevent the case from being decided.

> Other judges are available, and if they are not, the fault lay not with the defendant but with the resources of the system of court administration in this state. *Barker* points out that, where the delay is the result of overcrowded courts or lack of judicial manpower, '...such circumstances must rest with the government rather than with the defendant.'

Hadley v. *State*, *supra* at 466 citing *Dickey* v. *Florida*, 398 U.S. 30, 52 (1970). In short, the circumstances of the present case demonstrate no valid reason for the delay in reaching a decision.

In its recent decision in *United States* v. *Loud Hawk*, this court considered the implications and requirements of the Speedy Trial Clause of the Sixth Amendment in the context of an appellate delay in a criminal case. This area of inquiry has

been largely untouched by this court in the past. The *Loud Hawk* decision, while a first step, provides little guidance to lower federal courts in reviewing state appellate delays. The *Loud Hawk* case, which resulted in a split decision of this court, was concerned only with delay resulting from an interlocutory appeal. It did not involve the more common delay that results from a post-conviction appeal as occurred in the petitioner's case. Additionally, this Court's opinion in *Loud Hawk* confined its analysis to a consideration of the implications of the Speedy Trial Clause of the Sixth Amendment to the delay. It did not address the appellate delay in light of the requirements of the due process clauses of the Fifth and Fourteenth Amendments which apply to all stages of criminal proceedings.

The petitioner submits that the present case presents this court with a unique opportunity to consider the interplay of the Speedy Trial Clause and due process clauses in the context of a post-conviction appellate delay.

Conclusion

This case may be the first to present to this Court an opportunity to clarify speedy trial and due process rights of a criminal defendant in a post-conviction appeal who is required to wait such an extraordinarily long period of time for the appellate court to render its outcome. The petitioner, however, will surely not be the last to suffer consequences of such appellate delays. This is the appropriate time for this Court to define the extent of his and all other criminal defendants' rights during appeals.

For these and all the foregoing reasons, the petitioner accordingly prays that a writ of certiorari and certificate of probable cause issue so that a proper review may take place.

Respectfully submitted,

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Dated: June 16, 1986

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1958

DAVID S. SANDS,
PLAINTIFF, APPELLANT,

v.

MICHAEL J. CUNNINGHAM, WARDEN,
NEW HAMPSHIRE STATE PRISON,
DEFENDANT, APPELLEE.

Before
COFFIN, BREYER, AND TORRUELLA,
Circuit Judges.

MEMORANDUM AND ORDER
ENTERED MARCH 20, 1986

David S. Sands has requested a certificate of probable cause to appeal the district court's denial of his petition for habeas corpus. Sands raised seventeen issues in his petition, and the district court addressed each comprehensively. Having considered Sands' arguments and having reviewed the record, we conclude, for the reasons stated in the district court's opinion, that Sands has failed to make the requisite "substantial showing of the denial of a federal right." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983) (citations omitted). Therefore, Sands' request for a certificate of probable cause is denied.

By the Court,
FRANCIS P. SCIGLIANO, Clerk.

[Cert. cc: Clerk, U.S.D.C. of New Hampshire,
cc: Messrs: Watson and Malmberg]

APPENDIX B

U.S. District Court
District of N.H.
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United States District Court for the
District of New Hampshire

Civil No. 85-216-D

David S. Sands,

v.

Michael J. Cunningham, Warden,
New Hampshire State Prison.

OPINION

Petitioner brings this application for writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming that his December 13, 1978, conviction for two counts of perjury (N.H. RSA 641:1), the sentence imposed following the conviction, the sentence review by the state's Sentence Review Division, and the state appellate process were constitutionally infirm. Petitioner has raised seventeen grounds for relief.

Procedural History

Petitioner was indicted in 1977 for perjury arising out of his involvement in a civil proceeding concerning real estate in Carroll County. Plaintiff perjured himself by falsely identifying an individual responsible for signing a petition for ex parte attachment in this underlying civil matter. A detailed factual background of this case is contained in the New Hampshire Supreme Court opinion affirming petitioner's conviction, *State* v. *Sands*, 123 N.H. 570, 582-88 (1983), and will not be repeated here.

Convicted in 1978, petitioner timely appealed to the New Hampshire Supreme Court, raising Grounds One through Five and Eight through Fourteen now contained in the petition for habeas relief. The New Hampshire Supreme Court affirmed the conviction. *State* v. *Sands, supra.* Petitioner also appealed his sentence to the Superior Court Sentence Review Division, which affirmed the sentence. Petitioner then filed a petition for writ of certiorari with the New Hampshire Supreme Court seeking review of the Sentence Review Division's decision and raising Grounds Six and Seven now contained in the petition for habeas relief. The New Hampshire Supreme Court summarily affirmed the decision of the Sentence Review decision by denying the petition without opinion in October 1984. Petitioner also made several post-conviction motions raising Grounds Fifteen, Sixteen, and Seventeen now contained in the petition for habeas relief. These motions were denied by the trial court, and petitioner appealed to the New Hampshire Supreme Court, which summarily affirmed that decision in January 1985. Petitioner filed his petition for writ of habeas corpus with this Court on April 1, 1985, and respondent, pursuant to the Court's Order of May 8, 1985, has filed a response to show cause why the writ should not be granted. For the following reasons, the Court finds and rules that the petition for writ of habeas corpus must be denied.

ANALYSIS

Ground One: Petitioner herein claims that his Sixth and Seventh Amendment rights were violated when the trial court withdrew "materiality", an essential element of perjury under RSA 641, from jury consideration. The Court does not agree.

While it is established that the State must prove every element of an offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), it is also established that courts, rather than juries, should decide questions of law. *See State* v.

Sands, supra, 123 N.H. at 592. In the instant case, the New Hampshire Legislature in drafting RSA 641 specifically reserved determination of "materiality" for the trial court. *See* RSA 641.1. This reservation is consistent with the rulings of the United States Supreme Court and the First Circuit Court of Appeals. *See Sinclair* v. *Lewis,* 279 U.S. 263, 298 (1929) ("materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court"); *United States* v. *Scivola,* 766 F.2d 37, 44 (1st Cir. 1985) ("materiality is a legal question to be decided by the trial court") *citing United States* v. *Kehoe,* 562 F.2d 65,68 (1st Cir. 1977), *and United States* v. *Romanow,* 509 F.2d 26, 28 (1st Cir. 1975). The Court, accordingly, bound by established precedent, finds and rules that the state trial court's determination of "materiality" under RSA 641 did not violate petitioner's Sixth and Seventh Amendment rights since determination thereof was a legal question properly reserved to the trial court.

Ground Two: Petitioner herein expands his claim under Ground One to claim that this Fifth, Eighth, and Fourteenth Amendment rights were violated when the trial court declined to instruct the jury on a lesser included offense, false swearing. For the following reasons, the Court does not agree.

A defendant is entitled to a lesser included offense instruction in certain circumstances. According to the United States Supreme Court in *Beck* v. *Alabama,* 447 U.S. 625 (1980), a lesser included offense instruction is required by due process when warranted by the evidence. The Supreme Court further outlined federal constitutional standards for lesser included offense instructions in *Hopper* v. *Evans,* 456 U.S. 605, 612 (1981): "The federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.' *Keeble* v. *United States,* 412 U.S. 205, 208 (1973)." Accordingly, where the evidence presented to the jury would not permit a finding of guilty on the lesser offense, the failure to instruct thereon is not a constitutional infirmity.

In the instant case, the only difference under RSA 641 between felonious perjury and the misdemeanor of false swearing is the element of materiality required for perjury. The trial court made the determination that petitioner/defendant's statements were material. The fact that the jury did not make this determination, as discussed above, does not raise a constitutional issue. The Court accordingly concludes that since materiality had already been determined, the evidence presented to the jury would not permit a finding of guilty on the lesser included offense of false swearing; hence a failure to instruct thereon did not violate petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments.

Ground Three: Petitioner herein claims that his Fifth and Fourteenth Amendment rights were violated when the trial court allowed evidence on the element of materiality to be admitted in the presence of the jury.[1] According to petitioner, this evidence was irrelevant, immaterial, confusing, and prejudicial, and its admission denied him a fair trial. For the following reasons, the Court does not agree.

In reviewing a state court conviction on petition for habeas corpus, the Court is limited to searching for constitutional error. 28 U.S.C. § 2254(a); *Grieco* v. *Meachum*, 533 F.2d 713, 716 (1st Cir. 1976), *cert. denied sub nom.*, *Cassesso* v. *Meachum*, 429 U.S. 858 (1976).

In the instant case, the Court cannot find constitutional error in the admission of evidence pertaining to the materiality of petitioner's statements. The elements of materiality, falsity, and mental state under RSA 641 were intertwined in this case, and the evidence pertaining to materiality was also relevant to whether petitioner believed that his statement was false.

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[1] Respondent argues that habeas relief is unavailable under Ground Three because of petitioner's failure to contemporaneously object to the admission of the evidence pertaining to materiality. *See Breest* v. *Perrin*, 655 F.2d 1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981). The Court's analysis of Ground Three assumes, without deciding, that the contemporaneous objection rule does not apply in the instant case.

The trial court therefore properly admitted the challenged evidence, and the Court finds no constitutional error. *See United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

Ground Four: Petitioner herein claims that his Fifth and Fourteenth Amendment rights were violated when the prosecutor in closing argument charged for the first time that petitioner was involved in tax fraud. According to petitioner, these remarks were improper and prejudicial, denying him the right to a fair trial and due process. The Court does not agree.

In the instant case, petitioner was convicted of perjury for falsely identifying an individual, "William Smith", as the person responsible for signing a petition for ex parte attachment. William Smith was the trustee of the Forest Preservation Trust, a trust that was involved in certain real eatate transactions in Carroll County in the mid 1970's. In its closing argument, the State remarked that this trust was a tax fraud which petitioner attempted to conceal by his perjury. According to petitioner: the tax fraud remarks accused him of a crime for which he was not indicted and for which there was no supporting evidence; the remarks contravened prior exclusionary rulings of the trial court; and the remarks constituted prosecutorial misconduct because the State knew or should have known that the remarks were untrue. After review of the record, the Court concludes that the State's remarks did not constitute an error of constitutional magnitude.

First, evidence introduced at trial could support an inference that petitioner had created the Forest Preservation Trust for the purpose of committing tax fraud. Specifically, Linda Clough, petitioner's secretary, testified that petitioner himself had signed the ex parte attachment as "William Smith", although petitioner insisted codefendant Thomas Tsoumas signed the subject document; the State's handwriting experts testified that Tsoumas's handwriting did not match that of the fictitious William Smith; and income from the Forest Trust

for the years 1974-1976 was not reported to the IRS until April 1977, when Tsoumas[2] filed fiduciary returns. Moreover, the Court concludes that the prosecution's remarks concerning tax fraud were not meant to charge petitioner with a separate crime, but rather were meant to establish a reason or motive for petitioner's perjury.

Second, the trial court issued an order prior to closing argument limiting the scope of the State's summation. The trial court barred any reference by the State to a "conspiracy" or "prior crimes". Petitioner's counsel contemporaneously objected to the State's tax fraud remarks based on the trial court's prior order. The trial court, however, overruled the objection, ruling that the argument did not violate its order. Even assuming that the trial court erred in permitting the State's tax fraud argument, "[e]rrors in state court evidentiary rulings generally do not provide grounds for relief in a federal habeas corpus proceeding". 16 Fed. Pro., L. Ed. § 41:200 (1983). The only exception to this rule is if the error is "of such magnitude as to deny the fundamental fairness which is the essence of due process". *Id.* Permitting the State to argue tax fraud did not deny petitioner a fundamentally fair trial in light of the supporting evidence introduced at trial; hence the trial court's ruling is an insufficient ground for habeas relief.

Similarly, the Court cannot find prosecutorial misconduct in the instant case. Fifty years ago, the United States Supreme Court admonished prosecutors "to refrain from improper methods calculated to produce a wrongful conviction. . . ." *Berger* v. *United States*, 295 U.S. 78, 88 (1925). The Court did, however, recognize that a prosecutor could pursue a conviction "with earnestness and vigor". *Id.* The delicate balance inherent in the role of a prosecutor was aptly described by the Court: "while he may strike hard blows, he is not at liberty to strike foul ones." *Id.*

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[2] In March 1977, one month prior to the filing of the income tax returns, petitioner disclosed that Tsoumas was allegedly the fictitious "William Smith".

According to petitioner, there was prosecutorial misconduct because the State knew or should have known that the tax fraud argument was untrue. In support of this argument, petitioner points to his testimony that the IRS conducted an audit in 1975 and accepted his tax return. However, petitioner did not present any documentary evidence at trial to support his claim, and the prosecutor testified that he did not learn of the audit until after the trial had been completed. Given these circumstances, the prosecutor's remarks in closing argument were not so egregious as to render the trial fundamentally unfair, *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974), and the Court rejects this ground for habeas relief.

Ground Five: Petitioner herein claims that his Fifth and Fourteenth Amendment rights were violated because his conviction was obtained upon insufficient evidence to prove every element of perjury beyond a reasonable doubt. The Court does not agree.

Claims alleging the insufficiency of evidence to support convictions in habeas corpus proceedings are governed by the standard articulated by the United States Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307 (1979). According to *Jackson*, the Court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. Reviewing the record, the Court concludes that this query must be answered affirmatively.

Petitioner's secretary, Linda Clough, testified that she prepared the ex parte attachment and that petitioner signed it. Contrary to petitioner's assertions that codefendant Tsoumas had signed the ex parte attachment, the State's handwriting expert did not believe that codefendant Tsoumas was the signatory of the ex parte attachment. Moreover, petitioner had exhibited a reticence to divulge the identity of William Smith, and petitioner's interest as the attorney who created the Forest

Preservation Trust was closely aligned with the fictitious William Smith. A rational trier of fact could have considered this evidence and found the essential elements of perjury beyond a reasonable doubt. The Court accordingly rejects this ground for habeas relief.

Ground Six: Petitioner herein claims that his sentence was excessive and disproportionate in violation of his due process and equal protection rights under the Fourteenth Amendment, and his Eighth Amendment right to be free from cruel and unusual punishment. The Court does not agree.

Convicted on two counts of perjury, RSA 641:1, petitioner was sentenced to a period of incarceration on Count One of not more than five nor less than two years, with fifteen months of that sentence suspended. Petitioner was also fined two thousand dollars and ordered to perform five hundred hours of public service. On Count Two, petitioner was sentenced to a period of incarceration of one year, which was suspended, and was fined two thousand dollars. Commission of perjury is a class B felony, and therefore is subject to a maximum period of incarceration of seven years on each count, RSA 651:2 II(b), and a fine of two thousand dollars on each count, RSA 651:1 IV(a).

Pursuant to 28 U.S.C. § 2254(a), the Court may entertain an application for a writ of habeas corpus only on the ground that petitioner is in custody in violation of his constitutional rights. Petitioner's contention that his sentence was so severe and disproportionate as to deny him equal protection and due process as well as to constitute cruel and unusual punishment does not meet this standard. The sentence was within the range presented by statute and does not deprive petitioner of any constitutional rights. The severity of a sentence is not sufficient ground for habeas relief. *Willeford* v. *Estelle*, 538 F.2d 1194, 1196 (5th Cir. 1976); *United States Ex rel. Gardner* v. *Meyer*, 519 F. Supp. 75, 81 (N.D. Ill. 1981), 445 Fed. Pro., L. Ed. § 41:207 (1983). *See also Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980). The Court accordingly rejects this ground for habeas relief.

Ground Seven: Petitioner herein claims that the Superior Court Sentence Review Division failed to follow its own Rules 20 and 22 in reviewing his sentence, thus violating his Fifth and Fourteenth Amendment rights. These rules require that the Division evaluate certain factors in reviewing a sentence of incarceration to determine whether the sentence is excessive or disproportionate. Sentence Review Division Rule 20 states:

> The decision of the Sentence Review Division will be final and the reasons for any change of sentence will be stated therein in a written opinion. In its decision, the Sentence Review Division will give consideration, but is not limited to, the following objectives of the New Hampshire Criminal Code sanctions:
>
> (a) Isolation of the offender from society to prevent criminal conduct during the period of confinement;
>
> (b) Rehabilitation of the convicted offender into a non-criminal member of society;
>
> (c) Deterrence of other members of the community who might have tendencies toward criminal conduct similar to those of the offender;
>
> (d) Deterrence of the defendant himself;
>
> (e) Reaffirmation of social norms for the purpose of maintaining respect for the norms themselves;
>
> (f) The individual characteristics of the defendant prior to the imposition of the sentence, except that information, which does not affirmatively appear on the record or in the judge's statement of reasons for the sentence, shall be excluded;
>
> (g) The facts and circumstances of the crime or crimes which affirmatively appear in the record of the proceedings; and
>
> (h) Statistical information concerning the sentences imposed for the same crime committed by other individuals in the State of New Hampshire.

The relevant portion of Sentence Review Division Rule 22 states:

> The scope of review of the Division shall be:
>
> (a) The excessiveness or lightness of the sentence having regard to the nature of the offense, the protection of the public interest and safety, and the character of the offender.

According to petitioner, had the division considered the evidence presented at the sentence review hearing, the Division could only have concluded that incarceration of petitioner was inappropriate in light of Rules 20 and 22. Because the Division approved the sentence of incarceration, petitioner argues he was not treated on an equal basis with persons of similar background who have been convicted of perjury in New Hampshire. The Court does not agree.

Under 28 U.S.C. § 2254, the court will only entertain an application for writ of habeas corpus where a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. Upon review of the record, the Court cannot discern any such violation. First, the court in reviewing the decision of the Sentence Review Division will defer to that body's decision absent constitutional error therein. The Court will not cavalierly substitute its appraisal of petitioner's sentence for that of the Review Division. Second, and more importantly, there is nothing in the record to support petitioner's contention that the Division ignored its own procedural rules. While petitioner presented statistical evidence indicating that similarly situated individuals convicted of perjury did not receive sentences of incarceration in New Hampshire, such evidence was not binding on the Division. Rule 20 provides at a minimum eight criteria by which the division is to evaluate a sentence. Indeed, of the enumerated eight, the Division could well have considered deterrence, Rule 20(c), and reaffirmation of social norms, Rule 20(e), as grounds for approving petitioner's sentence of incarceration. Moreover,

the Division was not limited to the eight criteria in evaluating the sentence. Accordingly, the Court finds that the Sentence Review Division did not violate its procedural rules in derogation of petitioner's constitutional rights, and the Court rejects this ground for habeas relief.

Ground Eight: Petitioner herein claims that his conviction was obtained by the unconstitutional failure of the prosecution to timely disclose exculpatory evidence. The Court turns first to the question of whether petitioner exhausted his state court remedies with respect to this claim and concludes that he has so exhausted.

In *Anderson* v. *Harless,* 459 U.S. 4 (1982), the Supreme Court ruled that a federal habeas petitioner must provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. The Supreme Court noted that it was not sufficient merely to present all the facts to the state court, but instead required the petitioner to have "fairly presented" the "substance" of his federal habeas corpus claim to the state court in order to effect exhaustion of the state remedy. *Id.* at 6. Respondent herein argues that this particular claim was not exhausted because it was not highlighted in petitioner's original appellate brief to the New Hampshire Supreme Court. While it is true that the claim that the prosecution failed to disclose exculpatory evidence was not a highlighted issue in petitioner's brief, this fact is not dispositive of the exhaustion issue. Petitioner in his brief presented the facts underlying this constitutional claim, *see* Sands Brief, pp. 33-34, and referenced the leading case on the unconstitutionality of the prosecution's suppression of exculpatory evidence, *Brady* v. *Maryland,* 373 U.S. 83 (1963). The Court finds, accordingly, that the substance of petitioner's claim was fairly presented to the New Hampshire Supreme Court and petitioner thus exhausted his state remedies with respect to this claim. The fact that the New Hampshire Supreme Court did not address this issue in its

opinion does not alter the Court's finding, since exhaustion does not require that an issue be addressed in a decision where the substance of the claim has been fairly presented to the state court. *Smith* v. *Digmon*, 434 U.S. 332 (1978); *Williams* v. *Holbrook*, 691 F.2d 38 (1st Cir. 1982).

Turning to the merits of this claim, petitioner argues that the prosecution failed to disclose an instruction sheet prepared by petitioner for his secretary, Linda Clough, to be used in preparing a Writ of Summons. The Writ of Summons was to be filed with the subject petition for ex parte attachment. Petitioner testified that he typed the petition for ex parte attachment which was subsequently signed "William Smith" by codefendant Tsoumas while Linda Clough testified that she typed the petition for ex parte attachment and petitioner signed it "William Smith". According to petitioner, the instruction sheet is exculpatory because it contained monetary figures to be used in the Writ of Summons which differed from those contained in the petition for ex parte attachment. This discrepancy, petitioner argues, supports his contention that he typed the petition for ex parte attachment, while his secretary typed only the writ of summons.

The United States Supreme Court in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), opined that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

See, e.g., Moore v. *Illinois*, 408 U.S. 780, 794-95 (1972). Such prosecutorial misdeed will warrant reversal of conviction only where the failure to disclose impugns the fundamental fairness of the trial, *United States* v. *Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), and results in undue prejudice. *United States* v. *Drougas*, 748 F.2d 8, 23 (1st Cir. 1984).

In the instant action, the Court finds that nondisclosure of the instruction sheet prior to trial did not unduly prejudice

petitioner or deny him a fundamentally fair trial. The instruction sheet pertained only to the Writ of Summons, not to the petition for ex parte attachment, and the discrepancy in figures between the two documents does not prove that petitioner, rather than Linda Clough, typed the petition for ex parte attachment. The variation between the two documents does not prove that two people, rather than one, typed the documents; hence the instruction sheet cannot be considered exculpatory. In any event, even assuming that the instruction sheet was exculpatory, it was made available to petitioner at an early stage of the trial (the prosecutor had just called its third witness), and petitioner therefore had use of the sheet for cross-examination of Linda Clough or for any other allowable purpose. Access to the document at the early stage of trial therefore negated any undue prejudice to petitioner. The Court accordingly cannot find a violation of the rule enunciated in *Brady* v. *Maryland*, *supra*, and therefore rejects this ground for habeas relief.

Ground Nine: Petitioner herein claims that his conviction was obtained after trial upon indictments which were unconstitutionally vague and uncertain. The Court does not agree.

The sufficiency of a state court indictment is generally not open to inquiry in a habeas corpus proceeding. *Howard* v. *Flemming*, 191 U.S. 126 (1903); *Kohl* v. *Lehlback*, 160 U.S. 293 (1895). However, as recognized by this Court, where a state court indictment is so defective as to deprive the trial court of jurisdiction, habeas corpus relief is available. *Dukette* v. *Perrin*, 564 F. Supp. 1530, 1532 n.2 (D.N.H. 1983) (citations omitted). The sufficiency of the state court indictment depends upon whether "it gives the defendant enough information so that he can prepare for trial". *State* v. *Taylor*, 121 N.H. 489, 495 (1981), *quoting State* v. *Meloon*, 119 N.H. 76, 77 (1979). The Court finds petitioner's indictment sufficient under this standard.

Petitioner's first indictment read as follows:

> [T]hat David S. Sands [on March 7, 1977] did, during a hearing on Pending Motions in the Superior Court held at Ossipee, knowingly make a false material statement under oath, in response to questions asked, to wit:
>
> *Question:* And who signed William Smith's name there?
>
> *Answer:* Thomas Tsoumas.
>
> *Question:* And did he sign this in your presence?
>
> *Answer:* In one instance he did. In the other instance he handed it to me and said he had signed it. He acknowledged . . .
>
> when in fact defendant did not believe these statements to be true, and in fact said statements were false.

Petitioner's second indictment read as follows:

> [T]hat David Sands [on April 27, 1977] did, during a hearing on motions in the Superior Court at Ossipee, knowingly make a false material statement under oath, in a direct statement of witness, to wit: 'Well, as it turned out, Tom came up that night. I had him sign the Petition for Ex Parte Attachment, but apparently I did not sign all of the copies.' when in fact defendant did not believe this statement to be true, and in fact said statement was false.

Under New Hampshire law a person is guilty of perjury, RSA 641:1 "if in any official proceeding, he makes a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true."

In the instant action, petitioner's indictments closely track the language of the statute in question, specify the time and official proceeding at which the alleged perjurious statements were made, and detail the content of the statements themselves. The indictments are not unconstitutionally vague and uncertain, as they provided enough information for petitioner to adequately prepare for trial. The Court accordingly rejects this ground for habeas relief.

Ground Ten: Petitioner herein claims that his conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure in violation of his Fourth Amendment rights. Specifically, petitioner argues that certain documents such as a bank signature card and withdrawal slips obtained from his codefendant in the underlying civil litigation were subsequently unconstitutionally seized. Those documents were used at trial for the purpose of handwriting analysis. Petitioner, along with his codefendant, unsuccessfully moved to suppress these documents at the outset of the trial and unsuccessfully sought reversal of his conviction before the New Hampshire Supreme Court on the same ground. *State* v. *Sands, supra,* 123 N.H. at 607-08.

The mandate of *Stone* v. *Powell,* 428 U.S. 465, 494 (1976), bars federal habeas corpus relief where the grounds alleged urge that evidence obtained in an unconstitutional search or seizure was introduced at the petitioner's trial in those instances "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." If both the state trial court and the state appellate court addressed the petitioner's Fourth Amendment claim, the petitioner has indeed been afforded the full and fair review required under *Stone* v. *Powell. Maxwell* v. *Mabry,* 672 F.2d 683 (8th Cir. 1982). It has been further held that *Stone* v. *Powell* does not focus upon the potential for error in state court proceedings, but emphasizes the integrity of such proceedings, assuming that state courts will be as diligent as federal courts in protecting Fourth Amendment rights. *Palmigiano* v. *Houle,* 618 F.2d 877, 882 (1st Cir. 1980), *cert. denied,* 449 U.S. 901 (1980).

The Court finds that petitioner was afforded a full and fair review of his Fourth Amendment claim by the State. Not only did petitioner litigate this issue at the outset of trial, but he also argued it on appeal to the New Hampshire Supreme Court. The mandate of *Stone* v. *Powell* therefore precludes this ground for habeas relief.

Ground Eleven: Petitioner herein claims that his conviction was obtained by use of tainted evidence obtained in violation of his constitutional rights, including his right to privacy and to be free from deprivation of property without due process of law. Petitioner specifically complains about the documentary evidence [bank withdrawal slips and bank signature card] obtained from his codefendant Tsoumas during Tsoumas' deposition taken in the underlying civil litigation. According to petitioner, this evidence was obtained as a result of deception and subterfuge between law enforcement officials acting in concert with private attorneys in that underlying civil litigation. Assuming, without deciding, that petitioner has standing to raise this issue, the Court, after review of the record, concludes that the evidence complained of was not obtained in violation of petitioner's constitutional rights.

The record reveals that the documentary evidence was obtained from Tsoumas by the private attorneys in the underlying civil litigation in order to identify and locate "William Smith", the defendant in the civil litigation. This action was consistent with the private attorneys' obligation to pursue their clients' best interests. Moreover, the record fails to reveal any collusion between the State and these private attorneys. There is no evidence that the State encouraged or promoted the discovery of the documentary evidence in question. In addition, the Court cannot discern any violation of petitioner's right to privacy by the disclosure of these banking documents where they related to the critical issue of identification in the underlying civil litigation. The court thus rejects this ground for habeas relief.[3]

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[3] The Court also notes that to the extent petitioner raises a Fourth Amendment claim in Ground Eleven, the rule in *Stone* v. *Powell*, *supra*, 428 U.S. 465, precludes habeas relief.

Ground Twelve: Petitioner herein claims that his conviction was obtained by the use of improper and irrelevant evidence and by the exclusion of certain evidence sought to be admitted by petitioner. According to petitioner, these erroneous evidentiary rulings by the trial court violated his due process rights and his right to a fair trial. The court does not agree.

The standard to be employed in a habeas proceeding by this Court in reviewing alleged errors in evidentiary rulings by the trial court was explained by the First Circuit Court of Appeals in *Allen* v. *Snow*, 635 F.2d 12, 15 (1st Cir. 1980):

> The writ of habeas corpus ordinarily will not lie solely to correct alleged errors in evidentiary rulings. *Lisenba* v. *California*, 1941, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L. Ed. 1222; *Salemme* v. *Ristaino*, 1 Cir., 1978, 587 F.2d 81, 85. To rise to constitutional magnitude, such an error must 'so infuse the trial with inflammatory prejudice as to render a fair trial impossible.' *Salemme* v. *Ristaino*, *ante*, 587 F.2d at 86.

See, e.g., United States v. *Agurs*, 427 U.S. 97, 108 (1976).

Petitioner complains about the admission of: banking documents taken at the Tsoumas deposition; evidence regarding the dates of execution of certain documents (a handwritten agreement between petitioner and Tsoumas, a promissory note from petitioner to Tsoumas, and a schedule of beneficial interests); and evidence regarding petitioner's legal strategy in the underlying civil litigation. Petitioner also complains that the trial court improperly limited cross-examination of County Attorney Frederick Cox, a witness at trial, while permitting the State to cross-examine a defense witness, a friend of codefendant Tsoumas, without limitation.

The Court finds that these evidentiary rulings were not erroneous, and that even if they were, they did not "so infuse the trial with inflammatory prejudice as to render a fair trial

impossible." *Allen* v. *Snow*, *supra*. The Tsoumas banking documents including withdrawal slips and signature card were relevant for purposes of handwriting comparisons and the establishment of "William Smith's" identity. Their probative value outweighed their prejudice. The evidence regarding the agreement between petitioner and Tsoumas dated January 11, 1975, the promissory note from Tsoumas to petitioner, dated February 15, 1974, and a schedule of beneficial interests dated February 15, 1974, was more probative than prejudicial. Specifically, an FBI expert testified that these documents had all been prepared at the same time, supporting the inference that petitioner was "William Smith" and that Tsoumas and petitioner had attempted to cover up this fact. Similarly, petitioner's legal strategy in the underlying civil action included a prolonged refusal to disclose the identity of "William Smith" and an exception to testifying. This strategy supported the inference that petitioner was concealing the identity of "William Smith", and its probative value outweighed any prejudicial effect.

The trial court's rulings with respect to cross-examination were not so prejudicial as to render petitioner's trial fundamentally unfair. Petitioner sought to cross-examine County Attorney Cox regarding his previous prosecutorial decisions in actions related to the underlying civil litigation. The trial court, however, limited petitioner's inquiry of county attorney Cox to matters concerning the underlying civil litigation at the time of petitioner's alleged perjury. The scope of petitioner's desired cross-examination was overly broad, touching on irrelevant, tangential, and misleading matters, and thus was properly limited. Similarly, the court can find no error in the trial court's decision to permit the State to cross-examine a friend of codefendant Tsoumas regarding his failure to inform law enforcement officials that he possessed exculpatory evidence. The State's cross-examination of this witness attempted to discredit him by questioning his credibility and

raising the inference that his testimony was fabricated. Such cross-examination was proper and cannot be considered prejudicial to the extent of denying petitioner a fair trial.

In reviewing the trial court's evidentiary rulings, individually and as a whole, the court cannot discern any errors of constitutional dimension sufficient to warrant relief under 28 U.S.C. § 2254. This ground for habeas relief is accordingly rejected.

Ground Thirteen: Petitioner herein claims that his conviction was obtained after the jury had been improperly instructed by the trial court. Petitioner specifically complains that his due process rights were violated where the trial court instructed the jury that the state did not have to prove that the defendants believed their statements to be false. According to petitioner, this instruction improperly removed the element of *mens rea* from the jury.

In general, improper jury instructions will not form the basis of federal habeas corpus relief. *Niziolek* v. *Ashe*, 694 F.2d 282, 290 (1st Cir. 1982), *citing Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). A federal court can only overturn a state conviction based on improper jury instructions where the instructions "so infected the entire trial that the resulting conviction violates due process." *Id.* at 147. The Supreme Court in *Cupp* v. *Naughten* outlined the role of a federal court in reviewing a state jury instruction:

> [I]t must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

Id. at 146. Where the overall charge is fundamentally sound, a petitioner's due process rights are not violated, even though certain portions of the charge to the jury may be flawed. *Grace* v. *Butterworth*, 635 F.2d 1, 6 (1st Cir. 1980), *cert. denied*, 452 U.S. 917 (1981); *McInerney* v. *Berman*, 621 F.2d 20, 25 (1st Cir. 1980), *cert. denied*, 449 U.S. 867 (1980).

In support of his contention that the trial court erred in instructing the jury that the State did not have to prove that defendants knew or believed that the alleged perjurious statements were false, petitioner references RSA 641:1, which provides that a person is guilty of perjury if he makes a false material statement in an official proceeding and "he does not believe the statement to be true." Thus, according to petitioner, under RSA 641:1, proof that a person does not believe a statement to be true is equivalent to proof that a person believes a statement to be false. This construction fails to account for those occasions when a person does not know if a statement is true; i.e., he is confused or unsure of himself, while not really knowing if a statement is false. The perjury statute is only concerned with those instances where a person does not believe a statement to be true. The trial court instructed the jury in accordance with the statutory language that the State was required to prove beyond a reasonable doubt that the defendants did not believe the questioned statements to be true. The Court finds, therefore, that the overall charge was fundamentally sound and did not violate petitioner's due process rights, and the court accordingly rejects this ground for habeas relief.

Ground Fourteen: Petitioner herein claims that the trial court improperly failed to instruct the jury that the evidence presented must not only be consistent with the defendant's guilt, but must exclude every reasonable hypothesis of his innocence. Petitioner also contends that the trial court failed to instruct the jury properly under the principles of conflicting statements and witnesses, and was in error for emphasizing a particular indictment against codefendant Tsoumas and then failing to inform the jury that the indictment had been withdrawn. Petitioner also contends that the trial court improperly instructed the jury that they could make their own comparison of handwriting specimens separate from the handwriting expert's reports.

As discussed above, the Court will only grant habeas relief where a state jury instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten, supra,* 414 U.S. at 146. The challenged jury instructions herein or lack thereof do not meet this standard.

The trial court's charge with respect to the inferences allowable from the presented evidence did not abridge petitioner's rights to due process. The trial court instructed:

> The defendant is entitled to every inference in his favor which can be reasonably drawn from the evidence; and that being the case, where two inferences may be drawn from the same fact, one consistent with guilty and one consistent with innocence, if you were to so conclude, that's entirely within your role, judgment and decision, after weighing the evidence on any given issue, then and in such an event the defendant would be entitled to the inference which would be consistent with innocence.

This charge was fair, and the trial court thus was not obligated to instruct the jury that the evidence must exclude every reasonable hypothesis of innocence.

Similarly, the trial court's charge with respect to the principles relating to conflicting statements of witnesses did not so infect petitioner's trial as to abridge his due process rights. The trial court charged the jury that they were responsible for weighing the testimony of all the witnesses by considering their honesty, demeanor, intelligence, motives, bias, and interest. The jury was also instructed that they were free to accept or reject, in whole or in part, the testimony of any witness. The Court finds such charge consistent with the principles governing conflicts in witnesses' statements.

The trial court's decision not to inform the jury that a particular indictment against petitioner's codefendant Tsoumas had been withdrawn did not violate petitioner's right to due process. The indictment which had been read to the jury involved Tsoumas's claim to have signed a promissory note dated

February 15, 1974. Had the trial court informed the jury during deliberations that this indictment had been withdrawn, the possibility existed that the jury would infer that the State was removing its weakest case and permitting them to decide the strongest cases against Tsoumas and petitioner. The possible prejudice to petitioner in such a case is apparent, and the trial court's decision not to inform the jury of the *nolle prosequi* was not an error of constitutional magnitude.

The trial court's instruction that the jury was free to make its own comparisons of handwriting samples did not so infect petitioner's trial as to deny him his due process rights, and in fact is in accord with established law regarding evaluation of handwriting samples. A jury is permitted to conduct its own handwriting comparison of the testimony and reports of handwriting experts. *Strauss* v. *United States*, 311 F.2d 926 (5th Cir. 1963), *cert. denied*, 373 U.S. 910 (1963); *Goins* v. *United States*, 99 F.2d 142, 151 (4th Cir. 1938); *University of Illinois* v. *Spaulding*, 71 N.H. 163, 172 (1901). According to the court in *Strauss* v. *United States*, *supra*, 311 F.2d at 932:

> It is elementary, putting aside the expert testimony of genuineness... that the jury was entitled to draw their own conclusion as to the genuineness of the signature by a comparison with the admitted signature of appellant....

See also Hickory v. *United States*, 151 U.S. 303, 306 (1894) ("the comparison may be made by witnesses or without the intervention at all, by the jury themselves"). The Court accordingly rejects the challenges to the trial court's instructions or lack thereof as a basis for habeas relief.

Ground Fifteen: Petitioner herein claims that his conviction was obtained by actions of grand and petit juries which were unconstitutionally impaneled and were not representative of a fair cross section of the community in violation of his Sixth Amendment rights. The court finds this claim to be without merit.

Assuming without deciding that this claim is not barred by the contemporaneous objection rule, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) ("when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas corpus absent a showing of cause and actual prejudice"), *Breest* v. *Perrin*, 655 F.2d 1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981), the Court finds that petitioner has failed to establish a prima facie violation of the Sixth Amendment jury requirement of a fair cross section of the community. Petitioner specifically complains about the underrepresentation of lower income people, recent residents, nonhomeowners, women, and young people aged eighteen to thirty-four years of age on his Belknap County grand and petit juries in 1978.

The United States Supreme Court in *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979), outlined the requirements for establishing a prima facie violation of the fair cross section requirement. The defendant, petitioner herein, must show

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

With respect to the first prong of this test, petitioner fails to offer, nor can the court find any support for, his contention that lower income people, recent residents, and nonhomeowners are sufficiently unique to constitute "distinctive" groups for Sixth Amendment purposes.[4] In addition,

[4] In order to constitute a "distinctive" group for Sixth Amendment purposes, the group (1) must be defined and limited by some clearly identifiable factor (e.g., sex or race), (2) must have a basic similarity in attitude, ideas, or experience, and (3) must have a community of interest among its members such that the group's interest would not be represented if the group were excluded from the jury selection process. *See Willis* v. *Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 3546 (1984).

while the First Circuit Court of Appeals had previously held that young people (aged 18-34) were sufficiently unique to constitute a "distinctive" group for Sixth Amendment purposes, *LaRoche* v. *Perrin*, 718 F.2d 500 (1st Cir. 1983); *United States* v. *Butera*, 420 F.2d 564 (1st Cir. 1970), this position was reconsidered and overturned by the Circuit in *Barber* v. *Ponte*, No. 84-1750 (1st Cir. Sept. 18, 1985). Thus, in petitioner's claim, the Court finds only one challenged group, women, sufficiently distinct to satisfy the first prong in establishing a prima facie violation of the fair cross section requirement of the Sixth Amendment. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

Indicted and tried by grand and petit juries in Belknap County in 1978, petitioner attempts to show that women were unfairly and systematically underrepresented in the jury selection process by reference to statistics pertaining to a 1973 Belknap County jury venire contained in *State* v. *Fleury*, 114 N.H. 325 (1974). Petitioner fails to present any evidence pertaining to the composition of the grand and petit juries which indicted and tried him, nor does he present any evidence pertaining to the 1978 master list of jurors for Belknap County from which his juries were drawn. Without even such minimal evidence, the Court finds that petitioner has failed to show that women were unfairly and systematically excluded from his juries in violation of the Sixth Amendment. Reliance on five-year-old statistics is simply inadequate. The Court accordingly rejects this ground for habeas relief.

Ground Sixteen: Petitioner herein claims that his rights to due process were violated when the trial court and the New Hampshire Supreme Court failed to consider the challenge to the composition of his grand and petit juries because of New Hampshire's contemporaneous objection rule. According to petitioner, there was sufficient "cause and prejudice" to render the contemporaneous objection rule inapplicable. *Wainwright* v. *Sykes*, *supra*, 433 U.S. 72. The question

presented for resolution by the Court herein is whether the state courts committed an error of constitutional magnitude in applying the contemporaneous objection rule. The Court can find no such error.

Principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim was denied review by the state courts because of a procedural default, absent a showing of both cause for the default and resulting prejudice. *Reed* v. *Ross*, __ U.S. __, 104 S.Ct. 2901, 2908 (1984); *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982); *Wainwright* v. *Sykes*, *supra*, 433 U.S. 72. The state courts found that there was no cause for petitioner's failure to raise the challenge to the composition of his grand and petit juries and rejected petitioner's contention that New Hampshire's contemporaneous objection rule was inapplicable. This Court concurs in the state court's finding.

Petitioner contends that it would have been futile to challenge his grand and petit juries at trial because the law at that time required that a purposeful exclusion of a distinctive group be shown, *State* v. *Thompson*, 109 N.H. 205, 210 (1968); *State* v. *Fleury*, 114 N.H. 325, 333 (1974), and that it was not until after his trial that the United States Supreme Court in *Duren* v. *Missouri*, *supra*, 439 U.S. 357, held that only systematic exclusion of a distinctive group need be shown in making out a prima facie Sixth Amendment violation. Petitioner's argument fails, however, to recognize that the Supreme Court prior to his trial ruled that systematic exclusion of a distinctive group was required in a Sixth Amendment jury challenge in *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 531-33. Petitioner does not show cause for his failure to contemporaneously object where there is only perceived futility in such objection. *See Engle* v. *Isaac*, *supra*, 456 U.S. at 130 n.36; *Wainwright* v. *Sykes*, *supra*. In addition, assuming *arguendo* that there is cause for the failure to contemporaneously object in the instant case, the Court cannot find any prejudice result-

ing from the procedural default. As noted in the discussion of Ground Fifteen, there is no merit to petitioner's contention that his grand and petit juries were constitutionally infirm.

Finding application of the New Hampshire contemporaneous objection rule proper by the state courts, the Court accordingly rejects this ground for habeas relief.

Ground Seventeen: Petitioner herein claims that the twenty-nine month delay between oral argument and the rendering of the New Hampshire Supreme Court's decision on appeal violated his right to a speedy trial under the Sixth Amendment, to due process and fundamental fairness under the Fifth and Fourteenth Amendments, and to be free from cruel and unusual punishment under the Eighth Amendment. The Court does not agree.

Contrary to petitioner's contention, the court finds that the Sixth Amendment right to speedy trial is inapplicable to his state appellate proceeding. The purpose of the constitutional guarantee of speedy trial is (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3) to limit possibilities that long delay will impair the accused's ability to defend himself. *Smith* v. *Hooey*, 393 U.S. 374, 378 (1969); *United States* v. *Ewell*, 383 U.S. 116 (1966). The Sixth Amendment was adopted to assure that one accused of a crime is promptly brought to trial. *Barker* v. *Wingo*, 407 U.S. 514 (1972). The purposes of the Sixth Amendment, however, do not apply in the context of an appellate proceeding where the accused has already been convicted of an offense. *See United States* v. *Alston*, 412 A.2d 351, 356-57 (D.C. 1980); *State ex rel. Jones* v. *Court of Common Pleas*, 55 Ohio St. 2d 130, 9 Ohio Op. 3d 108, 378 N.E.2d 471, 472 (1978); *State* v. *Cooper*, 52 Ohio St. 2d 163, 6 Ohio Op. 3d 377, 370 N.E.2d 725, 737 (1977), *vacated in part*, 438 U.S. 911 (1978). *See also Harrison* v. *United States*, 392 U.S. 219, 221 n.4 (1968) (petitioner's contention that his right to speedy trial was violated

found to be wholly without merit where "[v]irtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of petitioner (or from the need to assure careful review of an unusually complex case"). Accordingly, in the instant case where petitioner had already been convicted of perjury, the delay in the state appellate process, for whatever reason, is not violative of any Sixth Amendment right.

Turning to petitioner's claim that the state appellate delay violated his due process right, the Court must consider whether such delay was so prejudicial as to violate all notions of fundamental fairness. *See Marion* v. *United States*, 404 U.S. 307, 325-26 (1971) (preindictment delay implicating due process). The Court cannot discern such prejudice in the instant case. The delay by the New Hampshire Supreme Court in rendering its decision did not jeopardize the fairness of a possible retrial. In addition, petitioner's personal woes and anxieties resulting from conviction and appeal are not sufficient to implicate the right of due process. *See United States* v. *Alston, supra*, 412 A.2d at 362. Moreover, the delay in the instant case, in large part, was attributable to the death of two justices assigned to the case as well as to the complexity of the legal issues presented for resolution. Considering these two factors, the Court cannot find a delay sufficiently prejudicial to violate petitioner's constitutional right.

Petitioner's claim that the state appellate delay constituted cruel and unusual punishment is also without merit. The delay did not violate the Fifth Amendment right to due process, nor did it violate the Sixth Amendment right to a speedy trial. The delay, in and of itself, is not so unusual, does not involve excessive physical suffering, and is not so repugnant to civilized people as to implicate the Eighth Amendment right to be free from cruel and unusual punishment. *See Furman* v. *Georgia*, 408 U.S. 238, 330-31 (1972). The Court accordingly rejects this ground for habeas relief.

APPENDIX C

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.